

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 17, 2003 Session

STATE OF TENNESSEE v. ERIC LAWSON

**Direct Appeal from the Circuit Court for Coffee County
No. 31, 113 John W. Rollins, Judge**

No. M2002-02192-CCA-R3-CD - Filed October 3, 2003

Defendant, Eric Lawson, was indicted by the Coffee County Grand Jury on one count of rape of a child and two counts of aggravated sexual battery. Defendant entered guilty pleas to three counts of aggravated sexual battery. Following a sentencing hearing, Defendant was sentenced to ten years in count one and eight years each in counts two and three. The trial court ordered that the eight-year sentences be served concurrent with each other, but consecutive to Defendant's ten-year sentence in count one, for a total effective sentence of eighteen years. In this appeal as of right, Defendant challenges the length of his sentence in count one and the trial court's order of consecutive sentencing. After reviewing the record, we affirm the judgments of the trial court, but remand for entry of judgments that properly reflect the release eligibility as 100% pursuant to Tenn. Code Ann. § 40-35-501(i)(1).

Tenn. R. App. P. Appeal as of Right; Judgments of the Trial Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Robert T. Carter, Tullahoma, Tennessee, for the appellant, Eric Lawson.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Charles Michael Layne, District Attorney General; Doug Aaron, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

Sentencing Hearing

Defendant was convicted for aggravated sexual battery against his stepdaughter, who was six years old at the time of the offenses. Lisa Marshall, the victim's mother and Defendant's former wife, testified that she discovered her daughter and Defendant alone together in the playroom of their

house. She did not see any inappropriate behavior, but she suspected abuse. Ms. Marshall “knew something wasn’t right” by Defendant’s reaction. Defendant was “acting kind of nervous.” She asked Defendant, “Why?” and Defendant responded that “he didn’t know.” Defendant indicated that he was willing to seek counseling. After discovering the abuse, Ms. Marshall found Defendant in the closet with a gun in his mouth.

Ms. Marshall subsequently took her daughter to Colorado to live with her natural father. Ms. Marshall returned to Tennessee and moved in with her parents. She began divorce proceedings against Defendant. The victim returned to live with her mother after having lived with her father in Colorado for one month. Defendant and Ms. Marshall together visited Dr. David Mathis. During their initial visit, Defendant became “very upset,” and said “some things in there that really shocked [Ms. Marshall].” Defendant admitted that he had been abusing his stepdaughter “for at least two years and that there had been a lot of petting.” Defendant threatened to kill himself and attempted to leave the doctor’s office. Ms. Marshall followed him, and Dr. Mathis called the police to escort Defendant to the hospital.

Ms. Marshall testified that Defendant worked, and they had a “really nice house” and did things together as a family. She described Defendant as “a good father.” Defendant continued to pay child support until shortly before pleading guilty in this case. Ms. Marshall described her daughter before the incident as “loud [and] active [and] she liked to laugh a lot.” She described her daughter after the incident as “moody” and “[s]he cries over everything [and] doesn’t like to be left alone.” The victim also had trouble “making friends like she used to” and “getting along with the other kids.” The victim received psychological counseling for at least one year.

Laura Prosser, of the Tennessee Department of Probation and Parole, prepared the investigative report in this case. Ms. Prosser interviewed Defendant at the Coffee County Jail on May 30, 2002. During that interview, Defendant stated that he was addicted to oxyhydrocodone, which was prescribed to him for back pain resulting from an injury that occurred in 1999. He also stated that he had been charged with aggravated sexual battery in the 1980's, but the case was dismissed. He blamed in part his actions in this case on “poor handling of a case in the 80's involving [his] daughter.” He also stated that he had been sexually abused by his brother in the past. Ms. Prosser testified that when she questioned Defendant about the incident in this case, he referred to the detailed confession that he gave to the police. Ms. Prosser testified that Defendant expressed remorse for the offense, that he continued to work and support his family after he was indicted for the offense, and that he was cooperative during the investigation.

According to the psychosexual report, prepared by Dr. John Lancaster, Defendant attempted to displace the blame for the offense on the child victim. Under the “Summary and Recommendations” section of the report, Dr. Lancaster stated, “It is my speculation that this inappropriate sexual response has been going on for quite some time and that there may be other past victims, which is not unusual for many sex offenders who themselves have been sexually abused.”

Dr. Scott Gale, a clinical psychologist, testified for the defense. Defendant sought treatment from Dr. Gale in January, 2001, after Defendant was released from Harton Hospital. Dr. Gale continued to treat Defendant until Defendant was incarcerated in May, 2002. Dr. Gale testified that Defendant “is a man who grew up under the shadow of a brother, with a cloud of abuse hanging over his head.” Defendant “fell in love and thought he had found his soul mate, felt that he had finally reached a niche in his life when he was a father and husband.” Dr. Gale testified that Defendant “is very close to both of his parents,” and that “[h]is family has been very accepting [of him].”

Dr. Gale diagnosed Defendant as having “major depression, recurrent.” Defendant told Dr. Gale that he believed that he had three options: “run, die, or go to jail.” Defendant also exhibited “some obsessive-compulsive features.” Dr. Gale did not believe that Dr. Lancaster was qualified to perform the psychosexual assessment of Defendant because he was not licensed to practice psychology in the State of Tennessee and also because Dr. Gale did not supervise him. Dr. Gale also testified that Dr. Lancaster failed to provide any data in the report.

Dr. Gale testified that there are five factors used to predict whether a sexual offender is likely to recidivate. Those factors include gender, age, substance abuse, prior acts of sexual abuse, and whether the offender used coercion on the victim. Dr. Gale stated that Defendant had a “much lower risk” of recidivism although males are more likely than females to become repeat offenders, and at the time of this offense, Defendant was in the age group that is more likely to be a repeat offender. Prior to committing the offense in this case, Defendant was charged with sexually abusing his daughter. Defendant denied having abused his daughter. Defendant told Dr. Gale that the abuse in this case lasted only briefly, and there were only a couple of incidents. Defendant also told Dr. Gale that his stepdaughter, who was six years old at the time, had been “overly seductive” towards him prior to the incidents in this case. Dr. Gale testified that “children are often hypersexual.”

Defendant’s father, Doyle Lawson, testified at the sentencing hearing. Defendant grew up one of six children in a “real close family.” Defendant was an obedient child. Mr. Lawson had discovered sixteen years prior to giving his testimony that Defendant had been the victim of sexual abuse. He did not discover who the offender was until one week prior to the sentencing hearing. Defendant had a “stormy relationship” with his first wife. Defendant had a “good relationship” with Ms. Marshall and her family. Defendant is a “deeply religious” person. Defendant began living with his parents after his separation from Ms. Marshall in January, 2001. Mr. Lawson worried that Defendant “might try to kill himself.” Defendant had “been in a terrible bout with depression.”

Defendant testified at the sentencing hearing. After graduating from high school, Defendant worked for his father’s construction business. Prior to his incarceration in this case, Defendant worked for Bridgestone for ten years. When Defendant’s natural daughter was four years old, he was charged with rape of a child. After their divorce, Defendant’s first wife reported concerns to the Department of Human Services (DHS), and DHS conducted an investigation. The charge was later dismissed. Defendant denied having done anything inappropriate with his daughter.

Defendant testified that following the incident, he and Ms. Marshall both drove the victim to Colorado to live with her father. When they returned, Ms. Marshall arranged a meeting with Dr. Mathis. At that initial visit, Defendant “basically, ripped the heart out of the woman [he] love[d].” Defendant understood that Dr. Mathis was obligated to report Defendant’s conduct to law enforcement. Defendant was transported from Dr. Mathis’ office to the hospital. Upon leaving the hospital, Defendant moved in with his parents.

Defendant was contacted by someone from the Coffee County sheriff’s department. Defendant went to the sheriff’s department, where he gave a detailed confession to the police. Defendant gave a written statement. Defendant was “not [in] a very good mental state, and [he] basically asked [the officer] to let [him] just write it down for [the officer] because [he] had to sit down and put the events in order, and [he] couldn’t do that verbally.” Defendant wrote a nineteen paragraph statement that is included in the pre-sentence report.

Defendant continued to live with his parents and support his family. Defendant sought counseling after the incident. Defendant testified that there are “no words to describe how [he felt] over the pain that [he has] caused other people. . . .” Defendant testified that he provided financial and emotional support for his family. His stepson had ADHD and required special assistance with his homework, and Defendant helped him. Defendant admitted that he pled guilty to the charges because he was guilty of the offenses.

At the conclusion of the sentencing hearing, the trial court imposed a ten-year sentence for count one and eight-year sentences for counts two and three, to be served concurrent with each other, but consecutive to count one, for a total effective sentence of eighteen years.

Standard of Review

When a defendant challenges the length or manner of service of his sentence, our review is *de novo* with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption is “conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is on Defendant to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments.

For the purpose of meaningful appellate review, the trial court shall place on the record either orally or in writing whatever enhancement and mitigating factors are found as well as specific findings of fact. Tenn. Code Ann. § 40-35-210(f) (1997 & Supp. 2002). In the event that the record fails to demonstrate the consideration required by the trial court, our review is purely *de novo*. *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997). If our review of the record shows that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this Court must affirm the sentence, even if it would have preferred a different result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In conducting a *de novo* review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristic of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; *see Ashby*, 823 S.W.2d at 169.

Consecutive Sentencing

The trial court failed to state on the record its reasons for imposing consecutive sentencing. Therefore, we review the trial court's order of consecutive sentencing *de novo* without a presumption of correctness. *See Poole*, 945 S.W.2d at 96.

Tenn. Code Ann. § 40-35-115, states in pertinent part:

- (a) If a defendant is convicted of more than one (1) criminal offense, the court shall order sentences to run consecutively or concurrently as provided by the criteria in this section.
- (b) The court may order the sentences to run consecutively if the Court finds by a preponderance of the evidence that:

* * *

- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

Tenn. Code Ann. § 40-35-115 (1997).

We conclude that the record supports the imposition of consecutive sentencing. Defendant was convicted of multiple counts of aggravated sexual battery against his six-year-old stepdaughter. Defendant admitted in his written statement, which is part of the pre-sentence report, that he "started feeling sexual desire for [his] stepdaughter" in November, 1999. The victim's mother testified that Defendant admitted that the abuse lasted for two years. Defendant admitted to "five or six" incidents of fondling, occurring over a period of several months. Defendant continued abusing the victim until his wife discovered the abuse in January, 2001. Defendant's confession contains a graphic description of the abuse, and the admitted sexual misconduct includes touching his penis to the victim's vaginal area and masturbating in front of the child. Finally, the record shows that the victim

suffers some “residual mental damage” because of Defendant’s abuse. Accordingly, we find no error in the trial court’s imposition of consecutive sentences.

Length of Sentence

Defendant argues that the trial court erred by imposing a sentence that was more than the statutory minimum in count one. In count one, the trial court sentenced Defendant to ten years. The trial court applied three statutory enhancement factors and found several mitigating factors. Defendant argues that his sentence should be reduced to the statutory minimum of eight years because the enhancement factors are “outnumbered” by the mitigating factors. Defendant does not contest the applicability of any of the enhancement factors.

Defendant pled guilty to three counts of aggravated sexual battery, a Class B felony. *See* Tenn. Code Ann. § 39-13-504(a)(4) and (b) (1997). The applicable sentencing range is eight to twelve years. Tenn. Code Ann. § 40-35-112 (a)(2) (1997). The presumptive sentence for a Class B felony is the minimum sentence in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c) (1997 & Supp. 2002). If there are enhancement and mitigating factors, the trial court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors. Tenn. Code Ann. § 40-35-210(e) (1997 & Supp. 2002). The weight to be given to each factor is left to the discretion of the trial court as no particular weight is prescribed by statute. *State v. Moss*, 727 S.W.2d 229, 238 (Tenn. 1986).

The trial court found the following enhancement factors applicable to Defendant’s sentence: (5) the victim was particularly vulnerable because of age or physical disability; (8) the offense involved a victim and was committed to gratify the defendant’s desire for pleasure or excitement; and (16) the defendant abused a position of public or private trust and used his status as the victim’s stepfather in a manner that significantly facilitated the commission of the offense. *See* Tenn. Code Ann. § 40-35-114 (Supp. 2002). The trial court found that those factors were “significant.”

In mitigation of the offenses, the trial court found that Defendant had a steady employment record; that he supported his family; that he expressed remorse for his criminal behavior; and that he had no prior criminal record. The trial court noted, however, that the gravity of the offense could not be ignored. The trial court also noted, “Sometimes we can rationalize and justify any course of conduct because of things that happened to you in the past, but I don’t think that’s significant justification in many instances to continue on a course of conduct that is detrimental to your fellow man or your children.”

Although Defendant does not contest the applicability of any of the enhancement factors, we conclude that the trial court improperly relied on enhancement factor (5), that the victim was particularly vulnerable because of her age. *See* Tenn. Code Ann. § 40-35-114 (Supp. 2002). We cannot find evidence in the record to support the application of that factor. Under Tenn. Code Ann. § 40-35-114, enhancement cannot occur through use of a statutory factor that is an element of the

offense. The statutory element that enhanced the offense in this case from sexual battery to aggravated sexual battery is the age of the victim, being less than thirteen years old. It is reasonable to assume that the legislature contemplated the vulnerability of child victims when it enhanced the felony classification of the offense committed against a child victim. When the statutory aggravating element is that the victim is less than thirteen years old, application of enhancement factor (5) requires proof that the victim be “in fact ‘particularly vulnerable,’ i.e., incapable of resisting, summoning help, or testifying against the perpetrator.” *State v. Adams*, 864 S.W.2d 31, 35 (Tenn. 1993).

Even if the record does not support the application of enhancement factor (5), however, Defendant is not entitled to a lesser sentence. Upon a *de novo* review, we conclude that the enhancement of Defendant’s sentence is appropriate. Application of enhancement factor (8) is proper because Defendant admitted in his written statement that he felt sexual desire for the victim. Defendant’s status as the victim’s stepfather provides a sufficient basis for the application of enhancement factor (16). Therefore, the trial court’s imposition of a ten-year sentence in count one is supported by the evidence.

Release Eligibility

Finally, pursuant to Tennessee Code Annotated section 40-35-501(i)(1) and (2), a defendant convicted of aggravated sexual battery shall serve one hundred percent of the sentence imposed by the trial court. The judgment of conviction form “shall indicate . . . [w]hether the defendant was sentenced as a one hundred percent (100%) offender pursuant to § 40-35-501(i).” Tenn. Code Ann. § 40-35-209(e)(7) (Supp. 2002). In this case, the judgment form indicates that Defendant was sentenced as a standard offender, and the release eligibility is thirty percent. Furthermore, at the sentencing hearing, the trial court made no mention of the statute or Defendant’s release eligibility status. We conclude that Tenn. Code Ann. § 40-35-501(i) applies to Defendant’s sentence. Accordingly, we remand this case for correction of the judgments to reflect that Defendant is sentenced in each case as a one hundred percent (100%) offender pursuant to Tenn. Code Ann. § 40-35-501(i).

CONCLUSION

We affirm the convictions, the length of the sentences, and the trial court’s order of consecutive sentencing. The case is remanded, however, for entry of amended judgments that reflect that Defendant is sentenced as a one hundred percent (100%) offender pursuant to Tenn. Code Ann. § 40-35-501(i)(1).

THOMAS T. WOODALL, JUDGE